In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1260

JAMES JAY KAPLAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that an obscene "peep-show" film should have been suppressed from evidence because there was no adversary hearing prior to the issuance of the search warrant; that the failure of the government to offer evidence of national community standards was error; and that the obscenity statute for the District of Columbia is unconstitutionally vague when viewed in light of the specificity requirements of *Miller* v. *California*, 413 U.S. 15.

After a bench trial in the District of Columbia Court of General Sessions (now the Superior Court of the District of Columbia), petitioner was convicted of presenting an obscene film in violation of D.C. Code §22-2001(a)(1)(B). He received a suspended sentence of six months' imprisonment, and was fined $300. the District of Columbia Court of Appeals affirmed (Pet.

App. A). This Court vacated and remanded for further consideration in light of *Miller* v. *California*, 413 U.S. 15, and companion cases (Pet. App. C). Upon further consideration the court of appeals reaffirmed the conviction (Pet. App. B).

A District of Columbia police officer viewed the subject film being shown at an arcade in a "peepshow" machine and, in a detailed affidavit, applied to the court for a search warrant to seize the film.[1] The day after the film was seized pursuant to the warrant, the court offered to hold a suppression hearing, but petitioner declined. A description of the film is set out in the appendix to the court of appeals' opinion (Pet. App. A, pp. 5a-6a).

1. Petitioner contends that the film should have been suppressed as evidence because no adversary hearing was held prior to issuance of the search warrant. This contention is answered by *Heller* v. *New York*, 413 U.S. 483, 492, where on facts almost identical to the case at bar, the Court held: "If such a seizure is pursuant to a warrant, issued after a determination of probable cause by a neutral magistrate, and, following the seizure, a prompt judicial determination of the obscenity issue in an adversary proceeding is available at the request of any interested party, the seizure is constitutionally permissible." Here there was a determination of probable cause by a neutral magistrate based on a description of the film in the detailed

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[1]The policeman's affidavit is set out in pertinent part in the petition, p. 3-4.

affidavit of the police officer who viewed the film.[2] The day after the seizure, petitioner was given the opportunity for an adversary hearing on the validity of the seizure, but he declined it. The seizure was therefore constitutionally permissible under *Heller.*

2. We consider petitioner's remaining contentions under the settled proposition that the laws and judicial system of the District of Columbia are to be treated like those of a state, and the District of Columbia Court of Appeals is to be included within the term "highest court of a State" for purposes of this Court's appeal and certiorari jurisdiction. See 28 U.S.C. 1257, 1363, 1451, 2113.

So viewed, there is no reason to defer disposition here pending the outcome in *Hamling* v. *United States,* No. 73-507, argued April 15, 1974.

a. Petitioner's contention that his conviction cannot be upheld absent the presentation by the government of evidence of national community standards of obscenity is refuted by this Court's recent decisions in *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 56, and *Kaplan* v. *California,* 413 U.S. 115, 121.

b. Petitioner contends that the obscenity provisions of D.C. Code § 22-2001(a)(1) are unconstitutionally vague because they do not define the specific sexual conduct, the description or depiction of which is prohibited, as required by *Miller* v. *California, supra.*

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[2]This affidavit objectively described the film in detail, and allowed the magistrate to make his own determination of its probable obscenity, and it is thus distinguishable from the conclusory affidavit in *Lee Theatre* v. *Virginia,* 392 U.S. 636.

However, the Court stated in *Miller* that "existing state statutes, *as construed heretofore* or hereafter, may well be adequate" (413 U.S. at 24, n. 6; emphasis added). Hence, while Section 22-2001(a)(1) does not contain such specifics, the court below could correctly affirm the conviction herein by finding that the Section, as previously construed, applies to specific sexual conduct such as that portrayed in the peep-show film. Such a finding was implicit in the opinion below (Pet. App. B) reaffirming petitioner's conviction and the court's former opinion, in which the court had held that the film was "obscenity per se" ("hard-core pornography") as defined in *Morris* v. *United States,* 259 A. 2d 337, 341 (D.C. Ct. App.) and *Womack* v. *United States,* 294 F. 2d 204 (C.A.D.C.). In *Morris* and *Womack,* the courts held respectively that simulated fellatio and intentional exposure of the vaginal area, and unretouched photographs of nude males,were "obscenity per se", *i.e.,* material that is "sexually morbid, grossly perverse, and bizarre, without any artistic or scientific purpose or justification." *Morris, supra,* 259 A. 2d at 341. Thus, the lower courts had previously construed Section 22-2001(a)(1) to apply to specific sexual conduct and had even gone further and defined a class of pornography which was "obscene per se" or "hardcore." The film here depicted sexual conduct which had been previously construed to come within Section 22-2001. The specificity requirement of *Miller* was therefore satisfied.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.